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NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

KEITH NOWICKI d/b/a
K & F FOOD MARKET

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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I. PETITION FOR CERTIORARI

The petitioner, Keith Nowicki d/b/a K & F Food Market, hereinafter referred to merely as "Nowicki," respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of the court which reversed the judgment in the United States District Court for the Northern District of Indiana which judgment had reduced Nowicki's administratively imposed period of disqualification from participation in the Food Stamp Program to 120 days.

II. OPINIONS BELOW

On March 24, 1971, the Director, Food Stamp Division, Food and Nutrition Service, U. S. Department of Agriculture determined that Nowicki would be disqualified from participation in the Food Stamp Program for a period of one year. Appendix A, p. 1. The Food Stamp Review Officer, Food and

Nutrition Service sustained the period of disqualification on April 27, 1971. Appendix A, p. 4. There were two Memorandums, or opinions in the District Court. These were not formally reported but are set forth in Appendix B, p. 8. The opinion of the Court of Appeals was rendered on June 22, 1976, and is reproduced in Appendix C, p. 18 to this petition, and is reported at 536 F.2d 1171 (7th Cir. 1976).

III. JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1976. Appendix C, p. 18. A timely Petition for Rehearing was filed and was denied on August 5, 1976. Appendix D, p. 31. The jurisdiction of this court is invoked under the provisions of 28 U.S.C.A. § 1254(1).

IV. QUESTION PRESENTED

Whether under the Judicial Review section of the Food Stamp Act a United States

District Court may reduce an administratively imposed sanction for violations of the Food Stamp Act when the sanction imposed by the Department of Agriculture is within the allowable range of remedies provided by the Food Stamp Act and the implementing regulations.

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves parts of § 11 and § 13 of the Food Stamp Act, 78 Stat. 707 (1964) 7 U.S. Code Annot. § 2020 and § 2022; and portions of 7 C.F.R. 272-274, 35 F.R. 19737. These are reprinted in pertinent part only in Appendix E, p. 34.

VI. STATEMENT OF THE CASE

A. ADMINISTRATIVE PROCEEDINGS

On January 13, 1971, Nowicki was informed by a letter from the Chicago office of the Food and Nutrition Service that certain employees of his store had violated the Food Stamp Act and the regulations adopted pur-

suant thereto on five occasions in early November of 1970. The violations consisted of exchanging non-food items such as cigarettes, beer, clothing, jewelery and paper products for food stamps. The violations were uncovered as a result of exchanges made by employees of the Department of Agriculture who posed as normal customers. Nowicki was subsequently advised on March 24, 1971 by the Director of the Food Stamp Division, Food and Nutrition Service, United States Department of Agriculture, that he would be disqualified from participation in the Food Stamp Program for a period of one year. Appendix A, p. 1. Nowicki sought the appropriate administrative review of that determination. However, on April 27, 1971, Marshall F. Spear, the Food Stamp Review Officer for the Food and Nutrition Service of the United States Department of Agriculture sustained the previously imposed period of disqualification. Appendix A, p. 4. The period of disqualification began on May 14, 1971.

B. PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

On May 27, 1971, Nowicki filed his civil action in the United States District Court for the Northern District of Indiana, South Bend Division, pursuant to the provisions of § 13 of the Food Stamp Act, 7 U.S.C.A. § 2022, for a judicial review of the above described administrative action. During the pendency of the civil action in the District Court, the District Court stayed plaintiff's disqualification period and enjoined the United States of America, hereinafter referred to merely as "the Government," from disqualifying Nowicki from participating in the Food Stamp Program. On November 22, 1974, the District Court granted a judgment to the Government and dismissed the injunction. Appendix B, p. 8. On February 24, 1975, the District Court sua sponte entered an order reopening the judgment of November 22,

1974. After further proceedings, including a hearing, the District Court then ordered on March 26, 1975 that Nowicki's period of disqualification be reduced from the previously imposed period of one year to a period of only 120 days. The District Court then entered judgment based on that order. Appendix B, p. 16.

C. PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND IN THE SUPREME COURT OF THE UNITED STATES

The Government appealed the judgment of the District Court which reduced the period of disqualification. On June 22, 1976 the United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court of March 26, 1975. Appendix C, p. 18. A timely Petition for Rehearing was denied on August 5, 1976. Appendix D, p. 33. On September 17, 1976, Mr. Justice Stevens ordered in No. A-226, and in response to Nowicki's application, that the

execution and enforcement of the judgment of the United States Court of Appeals for the Seventh Circuit be stayed pending the filing and disposition of this Petition for a Writ of Certiorari.

VII. REASONS FOR GRANTING THE WRIT

The issue to be presented to the Supreme Court on certiorari is an issue of first impression for the Court, and is the proper interpretation of the scope of judicial review of administrative decisions under the Food Stamp Act. The Supreme Court should grant the writ since under Rule 19(1)(b) of the Rules of the Supreme Court of the United States there is a conflict between the decision rendered in the instant case and the decisions of other United States Courts of Appeal in identical cases. Basically the United States Courts of Appeal have adopted two differing interpretations of this section of the Food Stamp Act. The existence of

these divergent views was noted recently by the United States Court of Appeals for the Second Circuit. J.C.B. Super Markets, Inc. v. United States 530 F.2d 1129 (2nd Cir. 1976). There the Court of Appeals stated as follows:

> "Whether the district court had jurisdiction in the first place to review the agency penalty is a question which has not been decided in this court and which has created divergent views in other circuits. We need not address it here since Judge Curtin adopted the more liberal standard which permits such review and found that U.S.D.A. had not abused its discretion ." (Emphasis added) J.C.B. Super Markets, Inc. v. United States, supra at 1123.

The Supreme Court has never resolved these divergent interpretations, but it should.

The first interpretation has been adopted by the Sixth Circuit in Martin v. United States 459 F.2d 300 (6th Cir. 1972) and by the Seventh Circuit in the instant case. Basically those decisions have held that the District Court could only determine whether evidence existed to substantiate the administrative finding of the Department of Agriculture that the merchant had violated the provisions of the Food Stamp Act and the regulations adopted pursuant thereto. A necessary part of this interpretation is that a District Court may not reduce administratively imposed sanctions if those sanctions are "... an allowable judgment in [its] choice of remedy." Butz v. Glover Livestock Commission Company, Inc. 411 U.S. 182, 36 L.Ed.2d 142, 93 S.Ct. 1455 (1973). Thus, the decisions adopting this interpretation hold that the period of disqualification cannot be reduced by a District Court if there is evidence to substantiate the administrative determination that a violation of the Food Stamp Act occurred and if the period of disqualification is within the legal authority of the Department of Agriculture.

However, that interpretation of the scope of judicial review under the Food Stamp Act is specifically disapproved by the United

States Court of Appeals for the Fourth Circuit and by the United States Court of Appeals for the Fifth Circuit. Cross v. United States 512 F.2d 1212 (4th Cir. 1975). Goodman v. United States 518 F.2d 505 (5th Cir. 1975). In Goodman v. United States the Fifth Circuit Court of Appeals held

> "... the judicial review provision of the Food Stamp Act does not limit the court's review to the finding of a violation of the Act by retail store, but also permits the court to review the sanction imposed on the store by the Department of Agriculture. This decision is in accord with the Fourth Circuit, and contrary to the Sixth Circuit, the only other circuits which have directly addressed the question." Goodman v. United States, supra, at 506.

In the instant case, the Seventh Circuit has clearly aligned itself with the Sixth Circuit.

In Cross v. United States, supra, the Fourth Circuit held

> "... that the scope of judicial review extends to the period of administrative sanction, notwithstanding that the Secretary did not impose a penalty exceeding that

> permitted by the statute or the regulations." Cross v. United States, supra, at 1215.

Thus, those opinions, together with the dissenting opinion of Judge Edwards in Martin v. United States 459 F.2d 300, 302-303 (6th Cir. 1972) adopt the interpretation of the Food Stamp Act sought by Nowicki here.

A close examination of those cases which have interpreted the scope of judicial review under the Food Stamp Act clearly indicates that the interpretation sought here by Nowicki is the proper one. The broad scope of judicial review sought here is supported first of all by the plain meaning of the judicial review section of the Food Stamp Act cited above. The term "administrative action" used in the statute is not merely a determination as to whether the Food Stamp Act has been violated. Rather that term encompasses two separate concepts. The first concept is that the Department of Agriculture makes a determination as to whether the Food Stamp

Act has been violated. Then, if it appears that the Act has been violated, the Department takes the second part of the administrative action "by imposing a sanction or penalty." Goodman v. United States, supra, at 509. Cross v. United States, supra, at 1219. This definition of administrative action is particularly appropriate here since the administrative action against Nowicki was not complete until the Department of Agriculture had imposed its sanction upon him. If the administrative action is only the finding that the Food Stamp Act was violated, there would be no aggrieved merchants since the only reason to complain about the administrative action is to dispute the imposition of a penalty.

The plain meaning of the term "trial de novo" also clearly supports the interpretation sought by Nowicki here. Generally the term "trial de novo" means that the entire matter will be heard again in its entirety,

including the hearing of all evidence, as though no previous action had been taken. This term has been defined in many cases and must surely have been in the mind of Congress when it was used in this statute. American Fruit Growers, Inc. v. S. T. Runzo & Company, Inc. 95 F.Supp. 842,844 (W.D.Penn. 1951). Spano v. Western Fruit Growers 82 F.2d 150, 152 (10th Cir. 1936). Goodman v. United States, supra, at 509. Martin v. United States, supra, at 302. If Congress had desired to limit the scope of judicial review, it could have refrained from using the established term of "trial de novo." Also, Congress could have specifically limited the trial de novo by using unambiguous limiting language. Since this was not done, a fair inference is that "trial de novo" should have its plain and ordinary meaning.

The interpretation of the Food Stamp Act sought here by Nowicki is also supported by the legislative history of the statute.

Welch v. United States, supra, at 686. This interpretation is also supported by the conclusion of the Court of Appeals for the Fourth Circuit that procedural due process is not properly provided during the administrative review portion of the Food Stamp Act. Cross v. United States, supra, at 1216-1217.

Perhaps one of the most compelling reasons for adopting the broad interpretation of the Food Stamp Act sought here by Nowicki is that adopting the narrow view will make unfair and arbitrary administrative decisions more unreviewable. It appears that the Supreme Court is seriously concerned that administrative decision making is becoming increasingly unreviewable and that administrative agencies may become more arbitrary and capricious. These two concerns were mentioned in Butz v. Glover Livestock Commission Company, Inc., supra, in the dissent of Mr. Justice Stewart and Mr. Justice Douglas. There they stated as follows:

> "The reversal today of a wholly defensible Court of Appeals judgment accomplishes two unfortunate results. First, the court moves administrative decision making one step closer to unreviewability, an odd result at a time when serious concern is being expressed about the fairness of agency justice. Second, the court serves notice upon the Federal judiciary to be wary, indeed, of venturing to correct administrative arbitrariness." (Emphasis added) Butz v. Glover Livestock Commission Company, Inc., supra, 411 U.S. at 191, 36 L.Ed. at 150.

If the Supreme Court permits the narrow interpretation of the Food Stamp Act to stand, this Court will, in effect, make administrative decision making more difficult to review and place additional burdens in the path of alleviating administrative arbitrariness and unfairness.

Perhaps it should be noted here that the Supreme Court will not have to overrule its previous decision in Butz v. Glover Livestock Commission Company, Inc., supra. Rather the Butz decision is distinguishable from the instant case. This is true even

though the Court of Appeals for the Seventh Circuit relied so heavily on Butz v. Glover Livestock Commission Company, Inc., supra, in its opinion. There the Court of Appeals adopted the analogy argued by the Government that the scope of review under other statutes such as the Commodity Exchange Act and the Perishable Agricultural Commodities Act is identical to the scope of review provided by the Food Stamp Act. The standard for judicial review under both the Commodity Exchange Act and the Perishable Agricultural Commodities Act is described in detail in Butz v. Glover Livestock Commission Company, Inc., supra. There the court held that a Court of Appeals may only decide whether the Secretary of Agriculture made an allowable judgment in the range of his choice of remedies. Butz v. Glover Livestock Commission Company, Inc., supra, 411 U.S. at 189. However, the analogy relied upon by the Court of Appeals is

not well taken. In the first place, the scope of judicial review is determined specifically by the particular statute under which the judicial review is requested. Cross v. United States, supra, at 1220. Thus using an interpretation of one statute which provides for judicial review to aid in interpreting another, and dissimilar, statute which provides for judicial review is inappropriate. Rather you must look specifically to the statute in question, in this case the Food Stamp Act. There are significant differences between the scope of review as provided by the Commodity Exchange Act and the Perishable Agricultural Commodities Act and the scope of judicial review provided by the Food Stamp Act. The Food Stamp Act provides for a "trial de novo" at the District Court level. However, in both the Perishable Agricultural Commodities Act and the Commodity Exchange Act "... the

Circuit Courts of Appeal are petitioned directly to review orders of the Secretary of Agriculture, such orders being issued only after completion of full administrative hearings." (Emphasis added) Goodman v. United States, supra, at 511. There is a significant difference between a trial de novo in a United States District Court and a direct appeal to the United States Court of Appeals. If the Food Stamp Act provided merely for a direct appeal from the orders of the Department of Agriculture to the United States Court of Appeals, then, and in that event only, the standard of review would be as described in Butz v. Glover Livestock Commission Company, Inc., supra. However, there is no direct appeal under the Food Stamp Act and the Supreme Court should distinguish the Butz case from the instant case.

An additional reason for granting the petition is that merchants operating under

the Food Stamp Act in one section of the country can have their periods of disqualification judicially reviewed and the sanctions reduced. However, in other circuits the period of disqualification, regardless of how arbitrary and capricious, is not subject to review by the District Courts. This is a discrimination which is due entirely to geography and has no rational basis whatsoever. Thus, the laws of the United States are not equally enforced throughout the country.

VIII. CONCLUSION

The Supreme Court of the United States should grant certiorari since there is a conflict between the decisions of the United States Courts of Appeal, and because this conflict in the decisions has resulted

in unequal and unjust application of the laws.

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